

**USF Dugan, Inc. and General Drivers & Helpers Union, Local No. 554, the International Brotherhood of Teamsters, AFL-CIO.** Case 17-CA-19761

September 28, 2000

**DECISION AND ORDER**

**BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN**

On June 12, 2000, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, USF Dugan, Inc, Omaha, Nebraska, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

*Naomi L. Stuart, Esq.*, for the General Counsel.

*Townsell G. Marshall Jr. and Richard O. Brown, Esqs.*, for the Respondent.

*M. H. Weinberg, Esq.*, for the Charging Party.

**DECISION<sup>1</sup>**

ALBERT A. METZ, Administrative Law Judge. The issue present is whether Respondent's discharge of Bruce DiMartino violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).<sup>2</sup> Based on the entire record, including my observation of the demeanor of the witnesses, and after the consideration of the parties' briefs, I make the following

**FINDINGS OF FACT**

**I. JURISDICTION AND LABOR ORGANIZATION**

The Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> This case was heard at Omaha, Nebraska, on September 22-23, 1999. All dates refer to 1998 unless otherwise stated.

<sup>3</sup> 29 U.S.C. § 158 (a)(1) and (3).

**II. OVERVIEW**

The Respondent operates an interstate freight delivery business with terminals in various States. Bruce DiMartino was hired by the Respondent in September 1992 and was discharged on June 25, 1998. The Government alleges that DiMartino's discharge was motivated by his union activities and was thus unlawful under the Act. The Respondent denies DiMartino was terminated for unlawful reasons. The Respondent asserts DiMartino's discharge was solely a consequence of his improper attempt to be paid for 1 hour of "delay time."

**III. BACKGROUND OF DIMARTINO'S UNION ACTIVITIES**

When DiMartino stated work for the Respondent a union did not represent the employees at the Omaha facility. Shortly thereafter, however, the Union did commence an organizational campaign at the Omaha terminal. DiMartino immediately became an active union supporter and solicited employees to sign union authorization cards, distributed union literature, and talked to employees about the Union. DiMartino regularly wore a union hat to work and displayed union stickers on his driver's logbook. He continued to conspicuously support the Union until his June 1998 termination.

On May 24, 1993, following a Board representation election, the Union was certified as the collective-bargaining representative of a unit of the Respondent's dockmen, warehousemen, and local and long-haul employees at the Omaha facility. On November 7, 1994, the Union was again certified as the bargaining representative of the same unit after a decertification election. The Union remained the bargaining representative of the unit until August 1996 when Respondent withdrew recognition from the Union.

**IV. EVENTS OF 1997**

In early January 1997 DiMartino had successfully bid to drive the Omaha to Minneapolis, Minnesota route but had yet to start that run. Dennis Bettin was the Minneapolis terminal manager at this time. Bettin testified that in early January he received a telephone call about DiMartino from Duane Sanders, Respondent's vice president of line haul, and Bettin and his terminal personnel should watch DiMartino and make sure he "follow[ed] company policy and procedure because it was union activities." Bettin was told to make sure that DiMartino was keeping his logs and everything had to be in "perfect order." Sanders said that Bettin should handle any problem with DiMartino at the Minneapolis terminal and if there were a problem with him on the road it would be handled differently.

Sanders testified at the hearing. Sanders did not specifically deny telling Bettin that DiMartino was a union activist and he should be watched to make sure his paperwork was in perfect order.

As a result of his work at the Minneapolis terminal, DiMartino had contact with drivers from Respondent's Chicago, St. Louis, and Kansas City terminals who also had runs into Minneapolis. DiMartino contacted Teamsters Local 120 in Minneapolis, and attended union organizational meetings in Minneapolis. While in the Minneapolis terminal, DiMartino regularly wore his union hat, displayed union stickers, distributed union

materials and union buttons, and talked to employees about supporting union organization at their home terminals. DiMartino engaged in similar activity at the Omaha terminal. Bettin testified that DiMartino always wore his union hat when he was in the Minneapolis terminal.

DiMartino testified without contradiction that in early April 1997 Bettin called him to the office. Bettin said he had received a telephone call from headquarters stating that two drivers had complained DiMartino was talking Union to them. Bettin told DiMartino that he did not have a problem with DiMartino, but that Wichita (headquarters) did have a problem with his activities.

DiMartino testified that when he returned to the Omaha terminal after his conversation with Bettin, Omaha Terminal Manager Ron Lahr also discussed the matter with him. DiMartino recalled Lahr telling him that there were complaints from drivers that DiMartino was talking Union. Lahr said that headquarters wanted DiMartino to “quit it.” DiMartino told Lahr it was none of his business what he did on his own time.

In late 1997 various local unions of the Teamsters Union filed election petitions for units at the Respondent’s Minneapolis, Kansas City and Omaha terminals.<sup>3</sup> DiMartino supported the Union’s efforts to organize the Minneapolis and Omaha employees by talking to fellow employees, distributing union literature at the terminals, and soliciting employees to sign union authorization cards.

In December 1997 DiMartino was in the Minneapolis terminal and attended a meeting held by Respondent concerning the impending union representation election. DiMartino wore his union hat to the meeting. Respondent’s President Charles Eggleton conducted the meeting. DiMartino testified that at the beginning of the meeting Eggleton stared at him, “like he wanted to burn holes in me.”

In Eggleton’s presentation he explained to the employees that the Respondent did not want its employees to be represented by a union. Eggleton said that Respondent’s employees at the Omaha terminal had voted in a union and that “it did not do any good for Omaha did it, Bruce?” DiMartino replied that union organization had not been successful at the Omaha terminal because there were no other terminals with union representation. Eggleton concluded his remarks and solicited employees’ comments. DiMartino spoke up about employee profit sharing, painting trailers, pin screws not fitting under pup trailers, and less equipment being bought. Eggleton made only a brief reply to DiMartino’s remarks.

<sup>3</sup> The election campaign at Omaha has been ongoing. The Union filed a petition on November 24, 1997, in Case 17–RC–11581 seeking to represent employees at the Omaha terminal. That petition was withdrawn on December 30, 1997, prior to the scheduled January 7, 1998 election. On January 8, 1998, the Union filed another petition in Case 17–RC–11707 seeking to represent a unit of employees, including drivers, at the Respondent’s Omaha and Grand Island, Nebraska facilities. On February 19, 1998, an election was conducted in that unit and the Union lost. On February 25, 1998, the Union filed objections to that election. The parties eventually agreed to void that election and rerun it on September 17, 1998. Again the Union lost the election and filed objections to the election.

Bettin corroborated DiMartino’s testimony that DiMartino attended the meeting in Minneapolis; that Eggleton told the Minneapolis employees that “the union didn’t get them nothing in Omaha”; and that Eggleton and DiMartino talked “back and forth” at the meeting.

Bettin testified that after the election petition was filed for the Minneapolis terminal he regularly spoke with Eggleton. Bettin testified that during these conversations Eggleton said that DiMartino was very prounion and was probably the individual doing “most of the damage.” Eggleton told Bettin to watch DiMartino and make sure he was following company policy. If Bettin found he was not, he was to write DiMartino up. Eggleton did not testify at the hearing. I credit Bettin’s testimony of conversations he had with Eggleton about DiMartino.

Bettin had two supervisors, Mike Phillips and Bruce Batkey, under his direction at the time of the union campaign. Bettin testified he talked to these supervisors about DiMartino telling them that he was the “biggest agitator” on behalf of the Union. Bettin instructed these supervisors, pursuant to Eggleton’s direction, to write up DiMartino if he was not following company policy. Neither Phillips nor Batkey testified at the hearing. I credit Bettin’s testimony of his instructions to these supervisors regarding DiMartino.

Bettin testified that in late 1997 he also had telephone conversations with Omaha Terminal Manager Ron Lahr, about DiMartino. According to Bettin, Lahr said that DiMartino was a “pain in the butt. If he could get rid of Bruce [DiMartino] that his union troubles would go away.” Lahr did not testify at the hearing. I credit Bettin’s testimony of his conversation with Lahr concerning DiMartino.

After the representation election was conducted in Minneapolis in December 1997, Bettin called Eggleton to report that the Union had lost the election. Eggleton stated that the vote was closer than he had anticipated, and that Bettin had his work cut out for him in 1998.

Bettin testified that he had another telephone conversation with Eggleton in 1997 between Christmas and New Year’s. Eggleton said that in 1998 Bettin was going to have to “get to work” and replace most of his line drivers at the Minneapolis terminal because of their union activities. I credit Bettin’s uncontroverted testimony of this conversation regarding Eggleton’s expression of union animus.

#### V. EVENTS OF 1998

Bettin testified that in early January 1998 he again talked on the telephone with Respondent’s vice president of transportation, Duane Sanders. Part of their conversation related to the results of the December representation election and that much of the Union’s support came from the line haul drivers. Sanders told Bettin to make sure that the line haul drivers were “crossing their T’s and dotting their I’s.” Sanders denied telling Bettin he should get rid of drivers because of their union activities or words to that effect. Sanders’ denial in this regard was not persuasive based on his demeanor. To the extent that his testimony could be interpreted as a denial that he told Bettin to closely watch drivers because of their union activities, I do not credit his denial. Bettin was a forthright witness who appeared

to be testifying to the best of his recollection. I credit Bettin's testimony as to the conversations between himself and Sanders.

#### *A. DiMartino's Work Routine*

Starting in February 1998 DiMartino's regular run was from Omaha to Gothenburg, Nebraska. This run was termed a "meet and turn." This meant that DiMartino would leave the Omaha terminal at approximately 10:30 p.m. and drive 238 miles to Gothenburg. This drive commonly took 4 hours to accomplish. The Respondent does not have a work facility in Gothenburg. When DiMartino arrived in Gothenburg at 2:30 a.m. he would wait at a convenience store called the "Pit Stop" for a driver to arrive from the Respondent's Denver, Colorado terminal. The Denver driver and DiMartino would then switch trailers and return to their home terminals.

When DiMartino arrived at the Pit Stop he would telephone the Respondent's central dispatch office at the Wichita headquarters to report his arrival time. When DiMartino was ready to depart from Gothenburg he would again telephone central dispatch to confirm his departure. DiMartino occasionally was assigned to make intermediate stops in Grand Island, Nebraska, a city located between Omaha and Gothenburg. DiMartino generally returned to the Omaha terminal by 7:30 to 8:30 a.m.

Occasionally, when either DiMartino or the Denver driver was uncommonly late arriving at Gothenburg, the central dispatcher would direct DiMartino to "drive on through" to Denver. Because Department of Transportation rules prohibit drivers from driving more than 10 hours in a 24-hour period, and also require 8 hours of rest before another dispatch, DiMartino had to "lay-down" and spend the night in a motel in Denver at the Respondent's expense. DiMartino would then take the Denver driver's run the following day and return to Omaha.

DiMartino was responsible for filling out a daily log that showed the time he left the Omaha terminal; the time of his arrival at Gothenburg; the time he departed from Gothenburg; and his arrival time at the Omaha terminal. The bottom left hand corner of the trip log showed the amount of "delay time" at Gothenburg that DiMartino claimed. Drivers were paid delay time for the time they spent waiting for the other driver to arrive at the common meeting destination. Delay time is compensated at a set hourly rate. This part of the trip log also showed the number of "drop and hooks" the driver claimed (time spent exchanging trailers).

#### *B. DiMartino Notifies Respondent of Doctor's Conference*

DiMartino's father developed severe health problems in the summer of 1998. As a result his father had a 10 a.m. appointment in Omaha on June 16 with a physician who is a cardiac specialist.

DiMartino wanted to be present with his father for the doctor's appointment. DiMartino testified that at least 2 weeks prior to June 16 he told Omaha Terminal Manager Ron Lahr about the meeting with the doctor. DiMartino told Lahr that if there were a problem being available for the appointment he would take a personal leave day. Lahr said that he did not have anyone to cover DiMartino's run so that he did not want DiMartino to take a personal leave day. Lahr said that it was unnecessary for DiMartino to take a personal leave day because he would be back in Omaha and off work in plenty of time to

get to the 10 a.m. appointment. DiMartino testified he also reminded Lahr of his need to be back in Omaha on June 16 as that date grew closer. DiMartino testified that each time Lahr assured him there was no problem with his being home in time to meet the doctor's appointment. Shea Cullen, another driver employed by the Respondent, testified that he overheard DiMartino's conversation with Lahr. Cullen confirmed Lahr assured DiMartino that there was no need to take a personal leave day because DiMartino would return to Omaha in time to attend the doctor's meeting.

#### *C. The June 16 Delay Pay Dispute*

At 2:30 a.m. on June 16, 1998, DiMartino arrived in Gothenburg, Nebraska. Ben Sell, the driver making the run from Denver, had not yet arrived. DiMartino telephoned the Respondent's central dispatch office in Wichita and reported his arrival time. DiMartino talked with central dispatcher Jim Howe. Howe told DiMartino that Sell's estimated arrival time in Gothenburg was 4:30 a.m. Howe said that because of the delay DiMartino was to drive on through to Denver. DiMartino protested and explained to Howe about the meeting with his father's heart specialist. He said that if he had to drive through to Denver he would not be back in Omaha in time for the 10 a.m. meeting. DiMartino explained how he had previously discussed the matter with Lahr and had been assured by him that he would be back in Omaha in time to attend the meeting.

DiMartino testified that he asked Howe when Sell had left the Denver terminal. Howe said he that he did not know. DiMartino told Howe that Sell normally arrived at Gothenburg 5 hours after he left the Denver terminal. Howe repeated that he did not know when Sell left the Denver terminal and that DiMartino would have to go on to Denver. DiMartino again stated that he had to be back in Omaha. Howe finally told DiMartino that he could wait for Sell until 3:30 a.m. but that if Sell did not arrive by that time then DiMartino would have to drive to Denver. Howe testified that at this point he also told DiMartino that he would be staying "on your own." Howe prepared a memo of the event which makes no mention of his having told DiMartino in this first telephone conversation that he would not be paid for the delay time. (GC Exh. 19.)

Sell did arrive in Gothenburg shortly before 3:30 a.m. DiMartino and Sell exchanged trailers and, before leaving Gothenburg, DiMartino again called central dispatch. He told Howe that he had a delay time of 1-1/4 hour drop and hook time. Howe said he would pay for the drop and hook time. DiMartino testified that Howe told him for the first time that he was not going to be paid delay time for the hour that he waited because he had been told to drive through to Denver. DiMartino responded, "Jim, the last thing you told me was to sit and wait for Ben Sell. That's delay time if you tell me wait." Howe ended the conversation by saying that he was not going to pay DiMartino, and if he wanted to get paid to talk to Respondent's vice president of line haul and maintenance, Duane Sanders.

Based on the comparative demeanor of the witnesses and Howe's memo, I credit DiMartino's testimony as to what was said in the two conversations with Howe on the morning of June 16. I further find that DiMartino was originally granted permission by Howe to wait for Sell without that permission

being conditioned on his waiving delay time. I find that Howe simply said in the second conversation that he was not going to pay DiMartino. I find that Howe said nothing about prohibiting DiMartino from recording his claim and seeking to get the pay if he could convince Sanders it was deserved.

DiMartino left Gothenburg at about 3:40 a.m. and went to Grand Island, Nebraska, where he dropped some freight. He then continued his journey to the Omaha terminal where he arrived at approximately 9 a.m. DiMartino then completed his trip sheet. On the trip sheet DiMartino claimed 1-hour delay pay for the time he spent in Gothenburg waiting for Sell to arrive. DiMartino entered the initials "J.H." by the claim for delay time to indicate the identity of the central dispatcher who was on duty when the delay time was incurred. DiMartino gave Lahr the trip sheet and told him that he had had a problem with Jim Howe not wanting to pay him for the delay time. Lahr, who was busy working at a computer terminal, grunted an acknowledgement in response, but did not talk to DiMartino. DiMartino then went to the 10 a.m. meeting with the doctor.

DiMartino testified that it was customary to discuss pay disputes with the terminal manager. Former Minneapolis Terminal Manager Dennis Bettin testified that he routinely investigated pay disputes and had the authority to adjust pay disputes without getting permission from Sanders or any other management official. This testimony was uncontroverted by the Respondent and I credit DiMartino and Bettin as to this routine practice of handling pay disputes.

Gothenburg, Nebraska, is considered to be a "closed terminal" because there is no supervisory representative of the Respondent at that location and it is a "meet and turn" location. According to DiMartino, delay time is considered "ancillary work." The Respondent's driver's handbook discusses the policy regarding the driver's handling of paysheets for ancillary work at closed terminals:

If you are at a closed terminal, you must write the Central Dispatcher's name who instructed you to perform ancillary work on your pay sheet. [GC.Exh. 15, p. 21.]

DiMartino's June 16 delay time claim was for 1 hour's pay. This amounted to approximately \$14.

#### *D. DiMartino's June 25 Discharge*

Between Tuesday, June 16, and Wednesday, June 24, DiMartino drove his regular route between Omaha and Gothenburg.

Sanders was on vacation the week of June 15 and returned to work on Monday morning, June 22. Sanders testified that the next morning Howe told him about the dispute with DiMartino not wanting to drive through to Denver on June 16. Howe reported that he had instructed DiMartino that he needed to drive through because the computer showed that the Denver driver would not be at Gothenburg until 5 a.m. Howe noted that DiMartino told him about his need to be in Omaha for his father's medical appointment. Howe explained that he and DiMartino had argued about the matter and he had told DiMartino that if he wanted to wait it was on his own. Howe concluded by telling Sanders that he had informed DiMartino that he would not be paid for the delay time because he had been told to drive

through to Denver. Howe said DiMartino had protested and he told DiMartino that he would not be paid and if he had any questions, he could talk with Sanders. If Sanders told him he should get paid, then Howe would pay him.

Sanders had DiMartino's June 16 daily log pulled so he could examine the document.

Sanders noticed that DiMartino had claimed the 1-hour delay time as ancillary pay and had also put "Jim H." as the dispatcher who authorized the ancillary time.

The next day Sanders telephoned Corporate Line Haul Supervisor Joe Don Fry and instructed him to speak with DiMartino about what had happened concerning the delay pay claim. Sanders then telephoned Ron Lahr in Omaha and told him of Fry's investigation.

When DiMartino came to work on June 25 he was told that he was to participate in a 10 a.m. conference call. The conference call did take place with DiMartino, Lahr, and Fry participating. Fry questioned DiMartino about the circumstances concerning the June 15-16 run. Fry wanted to know if dispatcher Jim Howe had authorized the 1-hour delay time pay that DiMartino had claimed. DiMartino stated what had happened from his perspective, including Howe's instruction to drive to Denver, the fact that he had eventually relented, and permitted DiMartino to wait for Sell. DiMartino stated that he had waited the hour for Sell and then Howe refused to pay him for the delay time. DiMartino told Fry how he had disputed Howe's position, entered the delay time on his trip sheet, and reported the dispute to Lahr when he turned in his sheet. DiMartino said that if he had not received the pay, then he was going to call Sanders. Fry concluded the call by telling DiMartino he was suspended pending further investigation. Lahr did not speak during the conference call.

Later in the day Sanders, Fry, and Lahr had a telephone conference call. Fry told Sanders what DiMartino had told him regarding the delay pay dispute. Sanders said that DiMartino should be terminated for (1) failure to follow a supervisor's instructions, (2) falsification of company records, and (3) stealing from the Company. They concluded their discussions with the decision to telephone DiMartino that evening and inform him that he was terminated.

On Thursday evening, June 25, Fry telephoned DiMartino and told him he was terminated. DiMartino told Fry that he wanted to speak to Sanders about the matter. Sanders telephoned him within minutes. DiMartino asked Sanders for the reasons he was being terminated. Sanders did not give him any reasons for the discharge and hung up the phone.

DiMartino telephoned Lahr the next morning and asked him for an explanation of his termination. Lahr did not give a DiMartino a reason for his discharge. DiMartino eventually received a termination letter dated July 2. The letter states DiMartino was terminated effective June 25 for "failure to comply with Company policy." The letter specified no details of what policy was violated.

The Respondent never paid DiMartino's claim for his June 16 delay time. He was, however, paid for his drop and hook time spent in exchanging trailers with Sell that morning.

Tom Simmons was DiMartino's successor driver on the Omaha to Gothenburg route. Simmons testified that he had

occasion to claim delay pay for weather-related delays. He did this by entering the delay time and the dispatcher who was on duty at the time in the lower left-hand section of his trip sheet. Simmons testified that the Respondent did not pay his claim for delay time, but that he was not disciplined for submitting the claim for the pay in such a manner.

## VI. ANALYSIS OF DIMARTINO'S DISCHARGE

The General Counsel has the initial burden of establishing that union or other protected activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). The elements commonly required to support such a showing of discriminatory motivation are union activity, employer knowledge, timing, and employer animus. Once such unlawful motivation is shown, the burden of persuasion shifts to the Respondent to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *NLRB v. MDI Commercial Services*, 175 F.3d 621 (8th Cir. 1999); *Presbyterian/St. Luke's Medical Center*, 723 F.2d 1468, 1478-1479 (10th Cir. 1983). The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). "A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

The record shows, and the Respondent concedes it knew, that DiMartino was an energetic and visible union supporter. The timing of DiMartino's discharge followed months of his visible union activity. The discharge also followed the statements of Respondent's supervision that his and other driver's union activities were to result in close scrutiny of their paperwork. Supervision singled out DiMartino as a key union activist who was a "pain in the butt" and was probably the individual doing "most of the damage." In late 1997, Eggleton told Bettin that many of the line haul drivers would have to be replaced in 1998 because of their union activities. Sanders, the person who made the decision to discharge DiMartino, also expressed a desire to get rid of him because of his union activities. Thus, in early 1997 Sanders warned Bettin about DiMartino being a union activist and issued instructions that DiMartino should be kept under close scrutiny and he should be disciplined if his records were not in "perfect order." These supervisory statements, which included admonitions from the Respondent's president, establish the Respondent's animus regarding DiMartino's union activities.

Under the adverse inference rule when a party has relevant evidence within its control which is not produced, that failure gives rise to an inference that the evidence is unfavorable to the party. *Auto Workers Union v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972). Such an inference is appropriate in this case. Neither Respondent's president, Eggleton, nor Omaha Terminal Man-

ager Lahr testified. Evidence that was damaging to the Respondent's case was presented that concerned each of these individuals. In Lahr's case it was the testimony of DiMartino that he advised Lahr there was a dispute about delay pay with Howe which Lahr acknowledged by a grunt. Thus it is uncontroverted that DiMartino had called management's attention to the dispute and did not seek to cloud his claim so that it would go through without challenge. Additionally, Lahr was not called to contradict the testimony that he had promised DiMartino he could return to Omaha on June 16 in time for his father's doctor appointment. Finally, Bettin's testimony is uncontroverted that Lahr told him DiMartino was a "pain in the butt" and that if he could get rid of DiMartino his union troubles would go away. Regarding Eggleton, Bettin's uncontroverted testimony showed that Eggleton was intent on closely watching DiMartino in order to find an excuse to discharge him because of his union activism. I infer that had the Respondent called either Lahr or Eggleton to testify, in each instance, their testimony would have been adverse to the Respondent's defense that DiMartino was fired solely because he wrongly claimed delay pay. *International Automated Machines*, 285 NLRB 1122-1123 (1987).

The credited evidence and the record as a whole show several notable facts regarding DiMartino's situation. DiMartino told Terminal Manager Lahr well in advance of June 16 that he needed to be home on that date. Lahr assured him that he would be back to attend the doctor's appointment. DiMartino worked the disputed 1-hour delay time. The Respondent acknowledges that DiMartino did wait the 1-hour of delay time he was claiming. The Respondent does not dispute the fact that DiMartino would be entitled to receive the delay time pay but for Howe's proclamation that he would not pay him if he chose to wait for Sell to arrive. Sanders was cross-examined about this point and could cite no other example where a driver had actually performed delay time work, or any other kind of work, and Howe had refused to approve payment for that work. Sanders further conceded that the Respondent had a uniform policy of pay that applied to all drivers. Sell arrived in Gothenburg within an hour, thus allowing both drivers to successfully complete their runs within prescribed time limits.

The Respondent thus avoided the cost of Sell and DiMartino going on to nonhome terminals and incurring motel expenses. DiMartino immediately informed Lahr of the dispute with Howe over the delay time. DiMartino was never paid the \$14 delay time for June 16.

I find that the Government has established by a preponderance of the evidence that DiMartino engaged in union activity, the Respondent knew of these activities, that the Respondent had an antiunion animus toward DiMartino's support for the Union, and that this animus was a reason for his discharge.

Sanders states that DiMartino's discharge is based on three reasons (GC Exh. 18):

1. DiMartino failed to follow the instructions of central dispatcher Howe not to claim the 1 hour of delay time.

The credited evidence does not support this contention. Howe only told DiMartino that he would not pay the claim. Howe said that if DiMartino disputed that decision he should talk to Sanders. Howe did not tell DiMartino that he should not claim the 1-hour delay time.

2. DiMartino falsified his time sheet by entering Howe's initials next to the 1-hour delay time claim, because Howe did not "authorize" payment for the delay time.

The credited evidence does not support this contention. DiMartino's delay time claim comports with the Respondent's own manual. DiMartino followed the Respondent's procedure that, "[i]f you are at a closed terminal, you must write the Central Dispatcher's name who instructed you to perform ancillary work on your pay sheet." The credited evidence shows that Howe told DiMartino he could wait for Sell at Gothenburg. The credited evidence shows that DiMartino did work the 1-hour delay time on June 16.

3. DiMartino was "stealing" from Respondent by claiming the 1-hour delay time.

The credited evidence does not support this contention. DiMartino merely objected to not being paid for time he had put in on the job. DiMartino made his written claim, handed it to Lahr, and informed him of the dispute with Howe. DiMartino did not attempt to disguise his claim and he was never paid the \$14. DiMartino's actions comport with past practice and the Respondent's employee handbook for making such a claim. Additionally, both Howe and Sanders conceded that DiMartino would have been entitled to delay time pay if the June 16 had this been a regular "meet and turn" trip.

In sum, DiMartino's claim is the type of situation that Sanders, Lahr, and Eggleton were looking for to use as an excuse to discharge DiMartino. In the Respondent's vernacular, DiMartino was not "crossing his T's and dotting his I's." I find that the Respondent's reasons for discharging DiMartino were a pretext and that the Respondent has not demonstrated that the same action against DiMartino would have taken place even in the absence of his protected conduct. I conclude that the Respondent's discharge of DiMartino was discriminatory, based on his union activities, and that his termination thus violates Section 8(a)(1) and (3) of the Act.

#### CONCLUSIONS OF LAW

1. USF Dugan, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. General Drivers & Helpers Union, Local No. 554, the International Brotherhood of Teamsters, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent, by discharging Bruce DiMartino, has violated Section 8(a)(1) and (3) of the Act.

4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended<sup>4</sup>

#### ORDER

The Respondent, USE Dugan, Inc., Omaha, Nebraska, its officers, agents, successors, and assigns, shall

<sup>4</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Discharging or otherwise discriminating against Bruce DiMartino for engaging in union or other protected activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Bruce DiMartino full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Bruce DiMartino whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Bruce DiMartino, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order. *Bryant & Stratton Business Institute*, 327 NLRB 1135 (1999).

(e) Within 14 days after service by the Region, post at its facility in Omaha, Nebraska, copies of the attached notice marked "Appendix."<sup>5</sup> Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 25, 1998. *Excel Corp.*, 325 NLRB 17 (1997).

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official

<sup>5</sup> If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board".

on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against Bruce DiMartino or any of you for supporting the General Drivers & Helpers Union, Local No. 554, the International Brotherhood of Teamsters, AFL-CIO or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Bruce DiMartino full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Bruce DiMartino whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Bruce DiMartino and, WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

USF DUGAN, INC.